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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-857

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

YESHIVA UNIVERSITY

No. 78-997

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor-Petitioner,

v.

YESHIVA UNIVERSITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE YESHIVA UNIVERSITY FACULTY ASSOCIATION

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BRIEF FOR THE YESHIVA UNIVERSITY FACULTY ASSOCIATION

Opinions Below

The opinion of the court of appeals (Pet. App. la-42a) is reported at 582 F.2d 686. The decision and order of the National Labor Relations Board (Pet. App. 45a-62a) are

reported at 231 NLRB 597. The Board's decision and direction of election in the underlying representation proceeding (Pet. App. 63a-79a) are reported at 221 NLRB 1053.

Jurisdiction

The judgment of the court of appeals (Pet. App. 43a-44a) was entered on July 31, 1978. The petitions for a writ of certiorari were filed on November 27, 1978 (No. 78-857) and December 19, 1978 (No. 78-997), within the period for filing as extended by Mr. Justice Marshall. Both petitions were granted on February 21, 1979 (A. 3-4).[1] This Court's jurisdiction rests on 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the National Labor Relations Board ("the Board") properly concluded that the faculty of Yeshiva University ("the University") are neither supervisors nor managers pursuant to the National Labor Relations Act ("the Act").

2. Whether there exists substantial evidence in support of the findings and conclusions of the Board in its decision in the underlying representation proceeding.

Statute Involved

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* are reproduced at Pet. App. 80a-82a.

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[1] References to the record of the underlying proceedings are indicated as follows: "A." refers to the joint appendix filed in this Court; "Tr." refers to the transcript in the representation proceeding; and "Emp. Exh." and "U. Exh." to University and Union exhibits, respectively, in that proceeding.

Statement

The history of the underlying proceedings, the structure of the University, and the respective roles of faculty and administration in the governance of the University are set forth in the Brief of the Board, pp. 5-20, and will not be reiterated here. Additional, relevant factual discussion has been incorporated in the Argument, *infra*.

Summary of Argument

1. Congress amended the Act in 1947 to exempt supervisors, as representatives of the employer, from its coverage. Its purpose was to avoid the division of supervisors' loyalty between the interests of the employer and a union, as well as to avoid an imbalance of power in the collective bargaining relationship which might result from the unionization of supervisors. The statutory definition of "supervisor," Section 2(11) of the Act, 29 U.S.C. 152(11), thus expressly requires that such persons act "in the interest of the employer." The Board's definition of "manager," as upheld by this Court, likewise requires that such persons exercise authority in the interest of the employer or are otherwise aligned and identified with the employer.

Section 2(12) of the Act, 29 U.S.C. 152(12), was also enacted in 1947, providing coverage under the Act specifically to "professional employees," including those who supervise junior professionals in the course of their professional training. Although professional employees may also be supervisors or managers, their exercise of authority in the fulfillment of their professional mission, rather than in the interest of the employer, does not warrant their exclusion as supervisors or managers.

In the statutory scheme of the Act, Congress has delegated to the Board the function of determining which classes of employees, including professionals, enjoy protection under the Act. This Court has called for judicial deference to Board determinations in this area in view of the administrative expertise of the Board and its greater familiarity with the underlying facts and conditions on which such determinations are based. In the instant proceeding, the Board found the University faculty to be covered under the Act, consistent with each of its prior rulings which applied Board law to the status of faculty in higher education.

The University faculty are professional employees, who collectively exercise certain influence over matters affecting the educational venture of the institution. That influence is a function of the *deference* allowed to the faculty, rather than authority *invested* in them by University management. Those areas in which the University may defer to faculty recommendations are precisely those involving their professional expertise; *e.g.*, curriculum, grading standards, peer evaluation, etc.

Despite the wisdom or appropriateness of faculty recommendations in these areas, however, University management reviews all such action originating from the faculty; reevaluates that action according to fiscal concerns and other managerial interests apart from those of the faculty; and exercises the ultimate authority to accept, reject, and/or implement recommendations from the faculty. Although they may share an ultimate goal of academic excellence, managerial concerns and prerogatives, separate from the professional interests of the faculty, impose fiscal and other constraints on the faculty's pursuit of that goal.

The lower court erred in its merger and identification of the interests of the faculty with those of the management of the institution.

2. In the enactment of the 1974 amendments to the Act, which extended Board jurisdiction over nonprofit health care employers, Congress recognized the exercise of jurisdiction by the Board in the area of higher education. Congress also considered the application of Section (11) to health care professionals as a result of proposals by organizations of health care professionals to amend Section 2(11). Congress chose, however, to rely on the Board's expertise and existing body of administrative law in drawing the distinction between professional and supervisory employment in the health care field.

Congress reviewed the experience of the Board in professional employee unit determination in other fields, with specific reference to faculty in higher education. In deferring the issue to the Board for case-by-case determination, the legislative history emphasized the distinction between supervision in the fulfillment of one's professional mission and supervision in the interest of the employer.

The legislative history of the 1974 amendments to the Act indicates congressional approval of the Board's exercise of jurisdiction over faculty in higher education.

3. The lower court failed to apply the standard of substantiality of the evidence in its review of the factural findings of the Board and reached its conclusion despite the substantial evidence on the record in support of the findings of the Board. The court did not defer to the expertise and fact-finding role of the Board, but imposed its judgment over that of the Board in the findings of facts on which it based its determinations of law. The court erred in reaching its conclusions on the record here, and erred specifically as to the interpretation and application of certain material evidence.

ARGUMENT

I.

The University faculty are neither supervisors nor managers, and are covered under the protection of the National Labor Relations Act.

A. The Exclusion of Supervisory and Managerial Personnel and the Inclusion of Professional Employees under the National Labor Relations Act.

There is no dispute as to the status of the University faculty as professional employees (Pet. App. 25a). The court below concluded, however, that the faculty are employed not only as professionals, but also as supervisors and managers (*id.* at 42a).

While the Act excludes supervisors and managers from its coverage,[2] it includes express provisions for the coverage of professional employees.[3] Although the Board has consistently balanced these legislative enactments in determining that faculty action in the areas of authority enumerated in Section 2(11)[4] derive from their professional status and mission rather than their alignment or identification

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[2] The definition of "employee" contained in Section 2(3) of the Act, 29 U.S.C. 152(3), excludes "any individual employed as a supervisor." See Pet. App. at 80a. The Act has also been authoritatively interpreted to exclude managerial employees from its coverage. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973).

[3] Section 2(12) of the Act, 29 U.S.C. 152(12) defines the term "professional employee," and provides for the coverage of such employees by the Act. Section 9(b)(1), 29 U.S.C. 159(b)(1), precludes the Board from placing professional employees in the same unit with employees who are not professional employees "unless a majority of such professional employees vote for inclusion in such unit." See Pet. App. at 81a.

[4] See Pet. App. at 80a-81a.

with the employer and its mission,[5] these dual directives are directly counterposed in the determination here at issue.

The professional status of the University faculty, as contemplated in the legislative and adjudicatory history of the Act, does not preclude a finding of their status as managers or supervisors, but requires a distinction between their identification as professional employees and as supervisory or managerial representatives. The court below failed properly to weigh or consider this distinction in determining the status of the University faculty.

The legislative history of the statutory exclusion of supervisors (29 USC 152 (11)) and the grant of special unit treatment for professional employees (29 USC 159 (b) (1)) reflects, in the words of one commentator, "a latent inconsistency which is delegated to the Board for resolution."[6] This "inconsistency" originates from the legislative efforts to exempt supervisory personnel from the Act after the Board's ruling in *Packard Motor Co.*, 61 NLRB 4 (1945),[7] that supervisory employees are entitled to protection under the Wagner Act. In view of that ruling and in the wake of growing success by the labor movement in the organization of foremen and other supervisory staff, the Senate Report on the Taft-Hartley amendments recommended the exemption of supervisors from the coverage under the Act:

> "A recent development which probably more than any other single factor has upset any real balance of power in the collective bargaining process has

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[5] See p. 11, *infra*, and *Wentworth Institute*, 210 NLRB 345, *enforced*, 515 F.2d 550 (1st Cir. 1975); *Kendall College*, 228 NLRB 1083 (1977), *enforced*, 570 F.2d 218 (7th Cir. 1978); *Boston University*, 228 NLRB 1008 (1977), *enforced*, 575 F.2d 301 (1st Cir. 1978), *petition for cert. pending*, No. 78-76; *Goddard College*, 234 NLRB 169 (1978).

[6] Finkin, *The NLRB in Higher Education*, 5 U. Tol. L. Rev. 608, 639 (1974).

[7] See *Packard Motor Co.* v. *NLRB*, 330 U.S. 45 (1947).

> been the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel, traditionally regarded as a part of the management, into organizations composed of or subservient to the unions of the very men they were hired to supervise." S. Rep. No. 105, 80th Cong., 1st Sess., 3, 4 (1947).

The legislative history of the supervisory exclusion is replete with similar findings and conclusions of the legislature. In *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1973), this Court noted the singular "objective" of both the House and Senate in enacting this amendment to the Wagner Act:

> "Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors, because supervisors were management obliged to be loyal to their employer's interests and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation.
>
> * * *
>
> "This [legislative] history compels the conclusion that Congress' dominant purpose in amending §§ 2(3) and 2(11), and enacting § 14(a), was to redress a perceived imbalance in the labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests. See generally *NLRB* v. *Bell Aerospace Co.*, [416 U.S. at 267]. We conclude, therefore [that the amendments to the Act do not require] an employer 'to accord to the front line of management a nominal status of employees.' S. Rep.

> No. 150, *supra*, at 5." *Beasley* v. *Food Fair of North Carolina, supra*, at 659-60, 661-62 (footnotes omitted).

In the consideration of the Taft-Hartley amendments, some members of Congress, including Senator Ellender, whose statutory proposal was the basis for § 2(12), sought to exclude professional employees specifically from the Act's protection.[8] These efforts failed, however, and § 2(12) was enacted, including within the definition of a professional employee both the fully recognized professional and one who is "performing related work *under the supervision* of a professional person to qualify himself to become a professional employee."[9] The performance of such "supervision" by the senior professional would thus not exempt him or her from coverage. The Conference Committee Report, recommending § 2(12) for passage, thus points to a community of interest between the two classes of professional employees:

> "This definition in general covers such persons as legal, engineering, scientific and medical personnel *together with* their junior professional assistants." H.R. Conf., No. 510, 80th Cong., 1st Sess., 36 (emphasis supplied).

This Court considered the history of this legislation in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973), as it pertained to the policy considerations supporting the exclusion of managerial and confidential employees from coverage

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[8] 2 NLRB, *Legislative History of the Labor-Management Relations Act of 1947*, at 695. See also *Hearings on Amendments to the National Labor Relations Act before the House Comm. on Education and Labor*, 80th Cong., 1st Sess., 1135 1225 (1947); *Hearings on S.55 and S.J. Res. 22 Before Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess., 694 (1947).

[9] 29 U.S.C. § 152(12) (emphasis added).

under the Act. Justice White's partial dissent points to the explicit inclusion of professional employees, relative to the implicit exclusion of managerial and confidential employees which the majority upheld:

> "It is apparent, it seems to me, that there are many professional employees who would qualify as managerial employees; yet the Act clearly treats them as employees for the purpose of the Act and Congress assumed they would have full organizational and bargaining rights unless it was provided otherwise in accordance with congressional desires. Hence, § 9(b)." *Id.* at 298.

The majority responded to Justice White by noting that professional employees are "plainly not the same" as managerial employees. *Id.* at 285, n. 13. The majority did not, however, address any distinctions between them, but cited only the legislative definition of professional employees and the Board definition of managers in *Ford Motor Co.*, 66 NLRB 1317 (1946).

The apparent tension in the statutory scheme providing for coverage of professional employees and the exemption of supervisory and managerial employees has been left to administration by the Board in its professional employee bargaining unit determinations. See Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977). This Court has repeatedly recognized that "the task of determining the contours of the term 'employee' has been assigned primarily to the agency created by Congress to administer the Act." *Allied Chemical & Alkali Workers* v. *Pittsburg Plate Glass Co.*, 404 U.S. 157, 166 (1971); *NLRB* v. *Hearst Pub. Inc.*, 332 U.S. 111, 130 (1944). Judicial deference has thus been afforded to decisions of the Board that particular individuals are in-

cluded or excluded from the Act's coverage. *Bayside Enterprises, Inc.* v. *NLRB,* 429 U.S. 298, 304 (1976); see also, *Trustees of Boston University* v. *NLRB,* 575 F. 2d 301 (1st Cir. 1978), *petition for cert. pending,* No. 78-67. This principle of judicial deference becomes particularly relevant in the context of the Board determination in the underlying proceeding here at issue.

The Board ruled on the basis of a record exceeding 4600 pages of testimony and 200 exhibits that the faculty of Yeshiva University are neither supervisory nor managers:

> "We find from our examination of the record, however, that the role and authority of the faculty herein with respect to hiring, promotion, salary increases, the granting of tenure, and other areas of governance are not significantly different from what they were in [*New York University,* 205 NLRB No. 4 (1973); *Northeastern University,* 218 NLRB 40 (1975); *University of Miami,* 213 NLRB No. 634 (1974); *Adelphi University,* 195 NLRB No. 639 (1972); *Fordham University,* 193 NLRB No. 134 (1971); and *C.W. Post Center of Long Island University,* 189 NLRB No. 904 (1971)], where the same arguments were rejected. At Yeshiva University, faculty participation in collegial decision-making is on a collective rather than individual basis, is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the Board of Trustees. As in the earlier decisions, we find that the faculty members are professional employees under the Act who are entitled to vote for or against collective-bargaining representation." Pet. App. 68a (footnote omitted).

With reference to the foregoing statutory history, we address below two areas of inquiry which bear directly on

the determination of whether faculty exercise such authority or are so aligned with management as to warrant their exclusion as supervision or managers: (i) the professional character of faculty employment, and (ii) the priority of interests they serve in their employment.

B. The Faculty as Professional Employees

The court below acknowledged that the authority of the University faculty to determine course content and teaching and student evaluation methods falls within Section 2(12) of the Act and "should not characterize them as managerial or supervisory" (Pet. App. 26a). But because the faculty exercise what the Court described as "extensive control" with respect to curriculum, workload, rank, salary and tenure of other faculty, and other University policy, "they are no longer exercising individual professional expertise [but are] in effect, substantially and pervasively operating the enterprise" (*id.* at 27a).

Although Section 2(12) defines a "professional employee," *inter alia*, as any employee whose work involves the "consistent exercise of discretion and judgment," the lower court found that the discretion and judgment afforded faculty in a unique, collegial mode gives rise to "a state of independence and influence on policy which is 'entirely unknown among the professionals in private industry'" (Pet. App. 28a). But the court failed to consider the nature of the influence which faculty exercise and how that influence is wielded in the collegial context.

The court mistook the role of the faculty in the fulfillment of their individual professional missions for their interest in "operating the enterprise" (*id.*). The role or mission of the professional employee may often correspond with the mission of his employer. For the hospital physician, for example, it is to render the highest quality of

medical care; for the community legal service lawyer, the delivery of the most effective advocacy and representation; and for the faculty member, the practice of optimum didactic skills. While the hospital, legal services program or university may be dedicated in purpose to corresponding aspirations, they must be operated with a separate, even sometimes conflicting perspective related to fiscal and other managerial constraints.

Professional employees' decisions to discharge or operate on a patient, to appeal a ruling, or to deny or grant admission to certain students may all ultimately affect the employer's finances or policy, but only as an unavoidable consequence of the fulfillment of their professional obligations in exercising the discretion required for the *professional* decision required. These actions do not derive from managerial or supervisory prerogatives. They are rather the fulfillment of the discretion and expertise inherent to the professional and implicit in his or her job responsibilities. They operate in no vacuum, but are subject to legal, regulatory and professional constraints,[10] as well as the poiley limitations of the employer.

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[10] In the hospital context, for example, the Joint Commission on the Accreditation of Hospitals requires for accreditation (and therefore third-party reimbursement to hospitals) that there be an "organized medical staff [with] overall responsibility for the quality of all medical care provided to patients, and for the ethical conduct and professional practices of its members as well as acounting therefor to the governing body." *Accreditation Manual for Hospitals*, 1973, at 35. For the attorney, his or her conduct is governed by the applicable canons of ethics, which necessarily determine one's obligations and responsibilities to the client, mandating compliance with those canons before even the employer's regulation. In higher education, teaching method has been protected by the 1940 *Statement of Principles on Academic Freedom and Tenure* of the American Association of Colleges and the American Association of University Professors, almost uniformly adhered to among institutions of higher education. Furniss, *Faculty Tenure and Contract Systems: Current Practice*, American Council on Education Special Report (July 27, 1972).

While management may assign a problem to an engineer or lawyer whom it employs, it hardly can dictate the solution that employee finds. The extent to which management utilizes that solution may often depend on the competence of the professional and the job done in arriving at and recommending that solution. The fact that management may ultimately use or implement and then profit from that solution does not render its creator a supervisor or manager; it reflects, rather, on the competence of the employee in fulfilling the professional mission delegated to him or her.

Thus, the faculty, individually and collectively, are delegated responsibilities for the development of curriculum and academic standards and, to a limited extent, evaluation of the professional merits of other faculty. Faculty fulfillment of these delegated responsibilities may, in fact, advance the best interests of the educational venture. But the fact that faculty recommendations in these areas may often be adopted by management is not reflective of their managerial or supervisory authority, but rather of the professional competence of the individual faculty member or the faculty body involved.

This dynamic between the advisory and consultative role of the faculty and the ultimate authority of the University trustees is central to the Board's rationale in faculty bargaining unit determinations. The ultimate authority of the University Board of Trustees, as delegated to and implemented by the administration, is a real part of the governance of the institution and its faculty. Where faculty recommendations become University policy, they are processed through faculty committees, then considered by deans and directors, then reviewed between the deans and Vice-Presidents, and ultimately reviewed and acted upon by the President for the Board of Trustees. Throughout this process,

the power of veto by administration officers and deans over virtually all aspects of faculty action is known at the University as more than a mere potential.

Although the record here shows involvement of the University faculty in many areas of the governance of the academic program, that involvement is not only delimited by their professional expertise, but is subordinate to managerial policy over which they exercise no control. The governing body of the University is the Board of Trustees which includes no faculty (A. 729). The Executive Council, which deals with policy on a University-wide basis, sits under the board of trustees; its membership is appointed by the President and is statutorily limited to University officers (A. 41-42). The University officers and administration include no faculty in the bargaining unit, and the deans are the respective chief administrative officers of each school, reporting to the University Vice-Presidents and President (A. 9-10, 94, 116-117; Tr. 155).

The President is exclusively authorized to hire full-time faculty upon recommendation of the dean or director of each school (A. 1179). Prior to any recruitment of new faculty, he must authorize the filling of an open position (A. 404; Tr. 3660). The dean of *each* school will interview and screen the merits of each candidate after preliminary screening by faculty (A. 210, 271-72, 404-05, 588). When the recommendations are forwarded to the President, he actively participates in the decision-making (A. 577-78, 593).

Rank, salary rate and term of appointment accompany the President's appointment. Although faculty at only two schools submit recommendations in these regards (A. 403-04, 407, 627-28), the available budget line authorized by the administration generally determines the rank and salary of a new appointee (A. 356-57, 405, 553, 623).

Most schools of the University have faculty committees which submit recommendations on faculty promotions to their respective deans (A. 193-94, 264-65, 395-96, 529-30, 619, 742). The dean then refers his own recommendation with that of the faculty committee for an independent review by the Vice-President for Academic Affairs, who has on a number of occasions rejected the recommendations of faculty in his denial of promotions (A. 193, 616-17, 619-20, 742). The role of the Vice-President of Academic Affairs is central in this and most other faculty personnel decisions, as he described it:

> "All recommendations for promotion finally wind up on my desk . . . I evaluate them . . . [and] in the course of going through these recommendations, therefore it is common for me to have to be in touch with the dean to ask for additional information, or to express problems that I am having in seeing how that recommendation is arrived at. . . . I have had conversation with almost every dean who has recommended every promotion in those terms (A. 56-58).
>
> * * *
>
> "[After consultation with the dean, I draw my own conclusions] so it becomes clear to me that it is not merely sort of an internal routine rubber-stamp promotion." (A. 59).

Tenure rules and procedures are promulgated by the Board of Trustees and were recently—and unilaterally—revised by the Board (A. 1191-97). The President has the sole authority, acting on behalf of the Trustees, to grant tenure (A. 1193-94), and the record here indicates that this authority is independent and absolute. Most schools do not even have a formal review procedure prior to the award or denial of tenure (A. 552; Tr. 2817, 4122), although some

departments or committees may make recommendations to the President through the deans, who have vetoed or blocked faculty recommendations for tenure (A. 232, 537-38, 667-68).

Faculty input in these decisions is not insignificant. The faculty may refer prospective new hires who are professional colleagues or associates. They may weigh and consider the qualifications of the individual as they relate to the academic needs and program of the department or school. They may advise the administration of the professional merits or distinction of the work of a colleague, even as it may relate to one's standing in the department or school. But the role of the faculty of Yeshiva University in these areas is advisory, at best, and circumscribed by the scope of professional expertise of the faculty as it relates to the academic or professional judgment involved.

Despite the exercise of such judgment by faculty, the needs and exigencies of the institution ultimately govern. University administration applies a separate and distinct perspective to the recommendations referred to it. While the faculty may render professional judgment on the merits of a professional, University officers first independently review that judgment and then balance its consequences with managerial and fiscal policy in which the faculty plays no determinative or advisory role.

The record indicates that the administration has not only rejected faculty judgments on academic merits in these personnel decisions, but that its unilateral determination of managerial policy has even precluded advice and consultation from the faculty. Thus in 1971 and 1972, the President froze all faculty ranks and notified the faculty that no promotions or salary increases would be granted at the University (A. 688, 1459). At one school, the President froze all promotions between 1971 and 1974 (A. 742). At another school, the administration removed a depart-

ment chairman who had been elected by the faculty of the department because the dean felt the faculty member lacked sufficient distinction as an academician, (A. 410-11).

The lower court nonetheless characterized faculty involvement in such decision-making processes as "shared authority" in the governance of the University (Pet. App. 35a-36a). Even if deference were allowed to the fact-finding of the court, it assessed the role of the faculty without a distinction between its role as professionals in *influencing* decisions affecting the integrity of the academic programs of the University and its role in determining managerial policy as it implicates the operation of the University. It is this same distinction which allows professional employees coverage under the Act, but disallows their address to managerial prerogatives in the arena of collective bargaining.

The accomodation between collective bargaining and managerial prerogatives confines the former to hours, wages, and terms and conditions of employment, as Section 8(d) of the Act, 29 U.S.C. 158 (d), specifies. The Act leaves beyond the scope of mandated bargaining the input of professionals in the quality or character of the services delivered by the employer, which subjects remain under the ultimate and unilateral authority of management. Separating out those matters amenable to the bargaining relationship and those reserved to management is the function of the Board. The proper scope of faculty bargaining is thus not the academic integrity of the University's "product," but the economic matters of faculty hours, wages, and working conditions—a distinction not only capable of administration, but also fundamental to the administration of the Act by the Board.

When the House Committee on Education and Labor recently considered the question of the coverage under the Act of interns and residents, it favored legislative reversal

of the decision of the Board in *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), which excluded those physicians on the grounds that they were primarily students.[11] The Committee noted the analagous experience of faculty and other pofessional employees under the Act:

> "The other objection cited in *Cedars-Sinai*, and voiced by some witnesses opposed to the bill, was that house staff collective bargaining would necessarily implicate matters of education that are not suited to the bargaining process. . . . We find this objection untenable. The Act limits the scope of collective bargaining to wages, hours, and terms and conditions of employment, and we are confident that the Board can and will confine housestaff bargaining to such matters as distinct from those which are solely didactic in nature. Newspaper reporters bargain without improperly implicating freedom of the press, faculty at religious educational institutions bargain without improperly implicating freedom of religion, faculty at educational institutions bargaining without improperly implicating academic freedom, and housestaff can bargain without improperly implicating their education. State and local labor relations agencies have been able to distinguish proper subjects of housestaff bargaining—such as wages, vacations, hours, insurance coverage, uniforms, laundry, meals, on-call rooms, tenure, etc.—from purely educational matters, and we believe the Board can do the same." H.R. Rep. No. 95-980, 95th Cong., 2d Sess., 6 (1978) (Citations omitted).

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[11] The Court of Appeals of the District of Columbia Circuit has recently reversed this determination of the Board, finding the legislative history of the 1974 amendments to the Act dispositive on the issue of the *inclusion* of interns and residents under the Act, as amended. *Physicians National House Staff Ass'n* v. *Murphy*, — F.2d —, (D.C. Cir. 1979), 100 LRRM 3055 (April 16, 1979).

Whatever else the faculty and university administration relationship entails, it surely requires an address to faculty salaries, insurance benefits, work schedules, etc.—the staples of all collective bargaining contracts. The decision of the lower court fails to separate out in the faculty-administration relationship the economic subjects which are bargainable from those subjects of educational policy which are not. The Act mandates the performance of precisely that function of the Board. See Finkin, *The NLRB in Higher Education*, 5 U.Tol.L.Rev. 608 (1974). Although the University management and its faculty may share certain interests and even some expertise in fundamental aspects of the University's operations, the faculty may not impose that standing or expertise in the collective bargaining relationship where it does not affect their "hours, wages, and terms and conditions of employment" (29 U.S.C. 158(d)).

It is in particular regard to these aspects of faculty employment where the legislative purpose of the supervisory or managerial exclusion must be carefully scrutinized against the congressional intent to provide protection under the Act to professional employees. While the exercise of independent judgment and discretion by professional employees may often impact on the mission of the employer, the Board is charged with the responsibility to determine whether the unionization of such employees would impair the ability of the employer to operate its enterprise by dividing the loyalties of those workers who serve as its representatives. Inquiry must therefore be directed at the impact and practicability of such a bargaining relationship.

Is collective bargaining for faculty in higher education inconsistent with a managerial, rather than professional status, and would it thus create an imbalance of power in the collective bargaining process; or would it properly afford standing to the faculty to bargain at arm's length

with the employer on those terms and conditions of their employment, delimited under Section 8(d), 29 U.S.C. 158(d), of the Act? The now substantial experience of college and university faculty in collective bargaining relationships in both the private and public sectors reflects the apparent viability of that relationship, as 80 private and 302 public institutions of higher education were engaged in collective bargaining relationships with their faculty as of January 1979, including eight law schools and four medical schools, and 130,000 faculty and professional staff who have been unionized.[12]

The precise experience of the Yeshiva University faculty in dealing with its administration over hours, wages and terms and conditions of employment underscores the disparate standing and the distinct interests of the faculty *vis-a-vis* its management. That experience has borne out, on one hand, the practicability of a bargaining relationship at the University; and on the other hand, the shortcomings of that relationship without the protection of the Act.

Salary scales for most full-time faculty have long been determined according to negotiations between faculty welfare committees and University administration. Yeshiva College and Stern College, for example, have negotiated jointly with the University administration since 1968 in the determination of faculty salary scales (A. 687, 1457). The welfare committees from both schools consist of elected members of the full-time faculty (A. 233-34, 300). Most recently these welfare committees have jointly negotiated with the Vice-President for Business Affairs, establishing salary rates

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[12] These figures do not include the 90,000 faculty members of the public four-year colleges and universities of California, where collective bargaining rights were granted to the faculties, effective July 1, 1979. National Center for the Study of Collective Bargaining in Higher Education, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education*, i-ii (1979).

for all full-time faculty at both schools, including department chairmen and senior faculty (A. 689-90). These rates are also given effect for the full-time faculty at Erna Michael College, one of the Jewish Studies Programs for the students of Yeshiva College (A. 309-10). The Yeshiva-Stern Welfare Committees have also taken up matters of fringe benefits and pensions, as well as retirement age (A. 689-91).

The Werzweiler Graduate School faculty Welfare Committee acts on behalf of the full-time faculty at Werzweiler in collective bargaining (A. 540). This welfare committee last negotiated with the University Budget Committee, composed exclusively of University administration and the dean of Werzweiler, and settled a two-year agreement of across-the-board salary increases for the entire full-time faculty (A. 541, 543). The faculty Welfare Committee at the Ferkauf Graduate School was established in 1967 pursuant to the School's by-laws and subsequently established a salary scale for the full-time faculty there. It has represented the faculty over such issues as sabbatical and sick leaves, retirement benefits, life insurance, etc. (A. 163, 674).

The full-time faculty at the Belfer Graduate School established a welfare committee in 1972, which also submitted salary proposals to the University administration for its full-time faculty (A. 485, 731-32). In the course of the spring and fall of 1973, the Ferkauf and Belfer Welfare Committees discussed their joint interests and reorganized as the Yeshiva University Graduate Faculty Association and in September 1973, submitted to the President a demand for recognition and collective bargaining demands for the full-time faculty at both the Ferkauf and Belfer Graduate Schools (A. 1451). The President responded through the respective deans:

> "I have been asked to inform you that University policy mandates that we pursue established channels

> of communication and procedure—*i.e.*, the Dean continue to confer with faculty committees and individual faculty members of the School on all administrative and academic matters. . . . I am therefore asking again that the members of the Welfare Committee meet with me and the University Budget Committee. . . ." (A. 1454, 1471).

Sabbatical policy is University-wide and set forth in the Faculty Handbook (A. 1197-99). In 1972, that policy was amended by the Board of Trustees unilaterally to limit the options available to the faculty (A. 67-68). That action was in response to budgetary problems at the University, and the faculty were allowed no part in the reformation of that policy (A. 696-97).

The retirement age of full-time faculty is also set forth in the Faculty Handbook, as established by the Board of Trustees, and any permission to extend the retirement age on a semester-to-semester basis must come from the President (A. 68). The Yeshiva College faculty, joined by the Sterm College faculty, recently sought to discuss through their welfare committees policy in this area, but the President refused to accept faculty action on this subject (A. 712-14). Faculty fringe benefits, including medical, hospital and life insurance, pension, tuition grants to relatives, and allocations for professional travel (requiring the dean's permission) are set forth in the Faculty Handbook, as unilaterally formulated and approved by the Board of Trustees (A. 1179).

The faculty have accordingly established some bargaining history with University management. Those negotiations and "agreements" have been limited to areas traditionally covered in collective bargaining. The management of the University has not "bargained" with the faculty

over those areas or concerns which management traditionally retains as it prerogatives.

Thus, in matters of curriculum and student affairs, faculty involvement is precisely limited to areas of their professional expertise, and ultimately checked by supervisory or managerial authority. Faculty play an active role in the formulation and development of curriculum, as do the deans and even the students at the University (A. 325-26, 357, 504, 564, 601-02). This role at various schools may be through committees, departments, faculty (and student) assemblies (*id.*). In each case the faculty usually act by consensus, with the dean's usual approval following (*id.*). The faculty may in a similar context work out requirements for majors and undergraduate degrees, as well as standards for admissions, grading, examinations, and graduation, although they must conform where applicable, to requirements of the New York State Department of Education (A. 191, 195-96, 254-55, 315-16, 360-61, 375-76, 506, 510, 519, 569-70, 598-99, 605).

In each of these areas, faculty action is nonetheless circumscribed by University policy and direction, with direct participation and direction from University officers, such as the Vice-President for Academic Affairs, the Registrar, and deans and directors of the schools. Thus the Vice-President for Academic Affairs testified:

> "All of our academic planning at the university has financial implications and financial needs, and therefore, just as I supervise and coordinate the academic planning throughout the university, Dr. Socol does so with respect to the fiscal wherewithal for such planning. He is the head of what they call the Office of Financial Services, of the University." (A. 75).

The Registrar likewise takes part in matters regarding student standards and grading (A. 609-10, 661-63), while students also contribute to decision-making in these areas as members of various curriculum and standards committees, as well as other student-faculty bodies at most of the schools (A. 247-48, 359, 523). Most critically, however, the deans play an active role in each of these areas, usually maintaining the final authority at each school to implement any change in curriculum or standards (A. 204, 253-54, 360-61, 368, 601-02, 705-06).

With even Committees on Committees, faculty action in these areas originates in an intricate committee structure which generally refers all action to the faculty as a whole, where the collegiate consensus is referred to the dean for his action within the constraints set and enforced by the University administration. The hierarchy is the same at each school and division, with the ultimate authority with the deans and administration to restrict and define policy according to that which emanates down from the Board of Trustees, rather than up from any collegial body of faculty.

While faculty, like other professional employees, exercise substantial authority in "matters of importance to the employer's financial and other managerial interests," Congress nonetheless chose to afford such professional employees protection and coverage under the Act. *Westinghouse Electric Corp.*, 163 NLRB 723, 726 (1967), *enf'd*, 424 F.2d 1151 (7th Cir. 1970), *cert. denied*, 400 U.S. 831. The Board explained in *General Dynamics Corp., Convair Aerospace Div.*, 213 NLRB 851, 857-58 (1974):

> "Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees

> either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial."

Thus there is no issue here over the exercise of professional *influence* by the faculty on the academic program of the University. But if faculty exercise *authority* in the precise areas enumerated under Section 2(11), the question of the existence of that authority; it requires a conclusion as to on whose account and for what purpose such authority may be exercised.

C. An Interest Analysis of Faculty Authority.

The lower court recognized that the Board has consistently denied managerial or supervisory status to faculty in higher education on the grounds that the faculty act on their own behalf and not on behalf of the employer (Pet. App. 32a-33a). The court rejected this finding and conclusion of the Board and found that faculty action in university governance is rooted in "the very nature of the educational process" and based on the concept of "shared authority," originating in the Middle Ages (*id.*). In sum, the court said, there is "no significant divergence between the interests of the faculty and those of the administration or

the Board of Trustees" (*id.* at 32a). The Board's "attempt" to dichotomize those interests, it said, is a "strained, artificial separation" because:

> ". . . the faculty has initiated, and the administration has repeatedly accepted, major policy determinations which constitute *the essence of the University's educational venture.* We cannot conclude that the full-time faculty here has acted in its own interest." *Id.* (Emphasis supplied).

It is clear that a determination of either supervisory or managerial status requires a finding that the employees act in the interest of the employer. Section 2(11) thus defines those areas of authority in which an employee must act "*in the interest of the employer*" to render him or her a supervisor.[13] In *Jas. H. Matthews & Co.* v. *NLRB*, 350 F.2d 432, 434-35 (8th Cir. 1965), *cert. denied*, 385 U.S. 1002 (1965), the court summarized the relevant judicial analysis in review of a Board decision determining the nature of an employee's exercise of authority in the areas enumerated under section 2(11) of the Act:

> " '[I]t is not alone that (the employee) may hire or fire or lay off or discipline. He must do so in the interest of the employer * * * (T)here must be a determination of status based upon the 'nature' of the supervisory position and 'how completely the responsibilities of the particular position identify the holder of the position with management,' all 'because of the infinite possible variations in responsibilities enumerated in § 2(11)' * * *" *International*

[13] Those who exercise such responsibilities in their own interest are not supervisors under the Act. See, *e.g.*, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 19 (1st Cir. 1977); *NLRB* v. *Wentworth Inst.*, 515 F.2d 550, 557 (1st Cir. 1975); *International Ladies' Garment Workers' Union* v. *NLRB*, 339 F.2d 116, 121 (2d Cir. 1964).

> *Union of United Brewery, etc. Workers* v. *N.L.R.B.*, 111 U.S. App. D.C. 383, 298 F.2d 297, 303, *cert. denied*, 369 U.S. 843 . . . (quoting from *Local 636 Plumbers* v. *N.L.R.B.*, 109 U.S. App. D.C. 315, 287 F.2d 354, 362)."

The court then continued to discuss its discretion in review of the Board's determination on this subject:

> "And where, as here, 'the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially,' the reviewing court's function is limited. * * * (T)he Board's determination * * * is to be accepted, if it has 'warrant in the record' and a reasonable basis in law.' *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 131. . . ." *Jas. Matthews & Co.* v. *NLRB*, *supra* at 435.

A similar analysis pertains to the determination of managerial status under the Act. This Court concluded in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 286-87 (1974), that employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer" are excluded from coverage under the Act. In the Court's analysis of the legislative and adjudicatory history supporting its holding, the Court approved the criteria for determining managerial status already applied by the Board and the courts, which inquired whether the employee's interests are "more closely identified" or are "closely aligned" with management.[14]

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[14] The decision notes the basis for the exclusion of managerial employees under the Act summarized in *Retail Clerks Int. Ass'n.* v. *NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966) (Burger, J.), *cert. denied*, 386 U.S. 1017 (1967): "Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it on the theory that they were the one[s] from whom the workers needed protection." 416 U.S. 288-289, n. 16.

Id. at 283-89. In remanding to the Board, the Court instructed: "[T]he question whether particular employees are 'managerial' must be assessed in terms of the employees' actual job responsibilities, authority, *and relationship to management.*" *Id.* at 290, n. 17 (emphasis supplied).

The lower court's decision effectively determines that the *entire* faculty of the University are "closely aligned" and "identified" with management, in whose interests they exercise their putative authority. The court does not distinguish among members of the faculty—instructors or other non-tenured faculty, relative to senior professional faculty or even department chairmen. For the purpose of its determination of the nature of authority which faculty exercise—its "interest" analysis—the court depends on a collectivization of the faculty voice and authority. It cites no evidence of individual faculty members exercising the authority it defines as "shared authority" (Pet. App. 35a).

But when the court considers the criterion of the Board that the collectivization of faculty authority militates against a determination of the supervisory or managerial status of individual faculty members, it incongrously concludes that the "collective authority" doctrine is not a "realistic interpretation" of section 2(11), and rejects its application to the definition of supervisory status (Pet. App. 31a).[15] But even if the Board's interpretation is valid, the court notes, the faculty are, collectively, managerial employees, excluded under the rationale of *NLRB* v. *Bell Aerospace Co., supra* (Pet. App. 31a-32a).

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[15] The court acknowledges that "[s]ection 2(11) does, however, state that it is applicable to an 'individual' who possesses the enumeration indicia of supervision" and that "if read literally the statutory definition can be construed not to cover full-time faculty" (Pet. App. 29a-30a). It nonetheless concludes that the "Board's interpretation is not the only reasonable reading of the language of section 2(11)" (*id.*), and substitutes its own judgment for that of the Board in another "reasonable reading" of the statute.

Under the court's analysis, each newly hired instructor, as well as his department chairman and every faculty member in between, formulate and effectuate policy with an alignment and identification with management. The court thus holds that all faculty are supervisors and managers, although they manage or supervise no other full-time faculty. The entire faculty are, the court seems to say, supervisors who supervise no subordinates;[16] managers, who manage no other personnel. All full-time faculty, along with the deans, administrators, Vice-Presidents, the President and Board of Trustees stand together, the court would have it, as a "collegiate," managerial body, including every full-time professional member of the academic community of the University.[17]

The line between the faculty body and the University administration is virtually obliterated by the court. Although the court concludes that "the University has accepted [faculty determinations affecting the essence of the University's educational venture] without hesitation so consistently" (Pet. App. 36a), it never denies or controverts the processes in University governance which require virtually every academic and personnel action to be reviewed, approved and ultimately implemented by the administration. Inherent in these processes is the separation

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[16] Section 12(b) of the Act, however, specifically includes under its coverage the subordinate professional employee who works "under the supervision of [another] professional. . . ." 29 U.S.C. 152(b).

[17] The meaning of the court's decision makes the Board's common inquiry into the ratio of supervisory to non-supervisory employees in a bargaining unit determination meaningless. See *Monarch Federal Savings & Loan*, 237 NLRB No. 116 (1978); *Brattleboro Memorial Hospital*, 226 NLRB 1036 (1976); *Russel S. Kribs Assoc., Inc.*, 181 NLRB 1109 (1970). The University argued before the lower court in its brief and at oral argument against the Board's inclusion of department chairmen in the bargaining unit precisely on the grounds of the "incredibility" of the "high supervisory ratios" which would result from their inclusion. Univ. Brief at 4, 44-45.

between the faculty body and the supervisors and managers of the University.

In its "interest analysis" the lower court fails to recognize or distinguish the professional mission of the faculty as employees relative to the responsibility of the employer to operate the institution according to fiscal and other exigencies and concerns outside of the University's "educational venture." Thus the decision of the court is silent with respect to the relationship between the faculty and administration in the processes affecting the determination of faculty hours, wages or terms and conditions of employment. The court focuses instead on "shared authority" in action relative to the merits of the academic programs or "educational venture" of the institution;[18] precisely those areas which comprise the professional component of faculty employment.

Whatever authority the faculty may possess at the University depends on the *deference* afforded to their action *by the administration.* No faculty body or individual faculty members at the University are invested with the authority to determine policy even in matters of curriculum and degree requirements, as well as in the selection, retention and promotion of colleagues. There are no University statutes, by-laws or other directives which grant to the faculty any vested authority in the decision-making processes here at issue. The faculty are instead advocates in those processes, speaking for the advancement of their professional goals and interests. The extent to which their voice is heeded depends not only on the wisdom or appropriateness of the

[18] While the Union recognizes the relevance of the input of the faculty in these areas, it must respectfully differ with the conclusion of the court that "the University has accepted [such input] without hesitation so consistently" that the Board's determination that faculty act in their own, rather than in the interest of the employer, is erroneous. See, *e.g.*, pp. 42-51, *infra.*

action espoused, but ultimately on unilateral determinations by the administration as to whether such action corresponds with the fiscal and managerial constraints of the University.

Thus no matter how academically sound the expansion of a department or school may be, and how effectively it may be urged by the faculty, any such action will depend on the ability and choice of management to fund and manage any such expansion; no matter how meritorious certain faculty members may be for promotion or tenure, and how strenuously their applications have been urged by their faculty colleagues, only the administration will determine whether the University will assume the obligations of such personnel commitments. Precisely such a dichotomy arose when the Administration froze all ranks and tenured lines, allowing no action on faculty recommendations for promotion and tenure for almost two years (A. 1278, 1459). On another occasion, a faculty member grieved the denial of her reappointment before a faculty committee, which reported that it supported her reappointment and would advise the dean and president accordingly, but that it was *without authority* to change her employment status (A. 1313-14).

The lower court seems to say, however, that because faculty recommendations generally find embodiment in University policy as a result of their acceptance by the administration, the faculty exercise such authority as to warrant their exemption from the Act as supervisors and managers. The effect of that ruling is to condition the definition of the faculty's status on the extent to which the administration defers to the articulated interests and goals of the faculty. The extension of such a doctrine would allow an employer to establish that certain workers were supervisors or managers by allowing to them an advisory role in certain matters of managerial or supervisory interest; and if their advice

was consistent with management's own objectives, by then accepting that advice.

From another perspective, this doctrine bases managerial identity or supervisory authority on the influence which an employee or group of employees may wield, rather than on the authority invested in their positions. Where an employee may bring to bear certain judgment on the operations of the employer, the employer's reliance on or utilization of that judgment (insofar as it conforms to its own objectives) may then, in the construct of the lower court, be the basis of the employee's exclusion from coverage under the Act. In applying such a doctrine to the circumstances of the University, the lower court found that *all* faculty enjoy such influence as to warrant their exemption from coverage.[19]

The decision of the lower court not only merges all faculty into a single mold, each member enjoying sufficient authority as to render him or her a managerial representative, but it merges the collective interests and authority of the faculty with those of the administration. The University, the court seems to say, is a joint enterprise of faculty and administration, without significant delineation between roles of faculty governance and university management. But while the court points to an overlap of faculty and managerial interests, it fails to recognize the entirely separate tracks of authority between faculty and

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[19] In the context of Yeshiva University, the lower court failed to note the significant variations in the relationships between faculty and administrative at the ten schools of the University involved in these proceedings. In some schools, for example, the faculty play no role in the tenure, promotion and other personnel decisions, while in other schools faculty committees submit recommendations in these regards to the administration. The record here is replete with evidence of the disparate practices, policies and standing of the faculty at the various schools, relative to the supervision or management of the University. See, *e.g.*, Point III, *infra* at 42-51. The court nonetheless found that all faculty of the University, irrespective of their rank, tenure, or school, enjoy supervisory and managerial authority.

administration, which comprise the decision-making processes of the University.

A study of the decision-making processes and authority at New York University, which that University offered in the hearings on its faculty's representation petition as an expert, scholarly source,[20] aptly draws the distinction between the exercise of *influence* by faculty on matters of professional, academic concern on one track, and the possession of formal, bureaucratic *authority* on the other:

> "The university's bureaucracy is not only multilayered but characterized by complicated parallel authority structures. At least two authority systems seem to be built into the university's formal structure. One is the *bureaucratic* network, with formal chains of command running from the trustees down to individual faculty members and students.
>
> "The other authority system is a *professional* network, for at all levels there are formal mechanisms for bringing the expertise of the faculty into the decision-making process. It is fascinating to note how this parallelism is built into the formal structure of the university. . . . The tangled system of committees, faculty meetings, and faculty councils, which is only hinted at in the organization charts, is really not just 'bureaucratic madness.' On the contrary, if it is madness at all, it is 'professional madness.' The parallelism between the bureaucratic and professional authority structures ensures that professional goals will have strong advocates in the decision-making councils. Duality of authority and ambiguity of power are the price of ensuring that faculty expertise will have its say." J. Baldridge, *Power and Conflict in the University,* 114 (1971) (emphasis in original).

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[20] *New York University, supra,* Case Nos. 2-RC-15719, 15757, Transcript at 311-12.

The Board has accordingly distinguished the exercise of influence by faculty over matters of *professional* concern and the possession of formal *bureaucratic* authority since its entrance into the "unchartered area" [21] of faculty unit determinations in higher education. That distinction becomes particularly relevant in view of the unique mode of organization and governance which the collegial model presents.[22] The Board's decisions in the arena of higher education thus comport with the legislative scheme of the Act to provide coverage to professional employees who do not exercise such authority and who do not share such interests with management as to warrant a finding of their alignment or identification with the employer.

The faculty of Yeshiva University are not representatives of the University. They are not employed on the premise or condition that their interests correspond with those of the management of the University. Rather, the premise of their employment is the professional competence which they bring to the University; and the measure of their performance is the excellence of their professional competence. That competence does not depend on an undivided loyalty to the management of the University.

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[21] *C. W. Post Center of Long Island Univ., supra* at 905.

[22] The Board thus noted in *Adelphi Univ., supra* at 648:

> "The difficulty both here and in *Post* may have potentially deep roots, stemming from the fact that the concept of collegiality, wherein power and authority is vested in a body composed of all of one's peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world. The statutory concept of supervisor grows out of the fact that in those organizations authority is normally delegated from the top of the organizational pyramid in bits and pieces to individual managers and supervisors who in turn direct the work of the larger number of employees at the base of the pyramid."

II.

Congress has indicated its approval of the jurisdiction exercised by the Board over faculty in higher education.

In 1974, Congress enacted amendments to the Act to extend coverage to employees of nonprofit health care institutions. In its consideration of that legislation, Congress not only recognized the experience of the Board in its exercise of jurisdiction in higher education, but specifically addressed the issue of the inclusion of professional employees in the health care industry with reference to the Board's treatment of professional employees in higher education and elsewhere.

These amendments were intended to complete the circle of coverage which had already been afforded to most other nonprofit employers under the Act. In 1947, amendments to the Act had been proposed in the House of Representatives to exempt all charitable and educational organizations from Board jurisdiction. In the companion Senate legislation, the exclusion was limited to nonprofit hospitals. The Senate proposal was adopted, as the Joint Conferees point out, because the Board had already concluded on its own part that most charitable and educational organizations were exempt from coverage under the Act on the grounds of their insubstantial effect on interstate commerce. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947).[23]

In *Trustees of Columbia University*, 97 NLRB 424 (1951), the Board accordingly cited the Conference Report

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[23] The Report of the Senate Committee on Education and Labor on the National Labor Relations Act, as originally proposed before Congress, thus cited as an example of employer-employee relations excluded from coverage a college professor's dispute with his college. S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935). That example related to the then contemplated exclusion from coverage of charitable and educational organizations, *per se*, in view of their perceived insubstantial effect on interstate commerce.

in explaining its refusal to assert jurisdiction over institutions of higher education. Subsequently, that decision and its reasoning were overruled by the Board in *Cornell University,* 183 NLRB 329, 331 (1970), where the Board concluded:

> "The fact remains that Section 2(2) contains no express exemption for nonprofit employers and that subsequent legislation has indicated a congressional preference that the Board should favor asserting jurisdiction in lieu of creating a no-man's land of non-regulation."

Thus in 1974, when Congress extended the coverage of the Act to nonprofit health care institutions, the *Cornell University* precedent and its progeny were well ensconced in a line of Board precedent, consistently asserting jurisdiction over institutions of higher education and their faculty.[24] In the course of the Congressional debate over the 1974 amendments to the Act, no controversy arose over the continuation of the jurisdiction assumed by the Board over institutions of higher education or their faculty. To the contrary, both the House and Senate recognized the experience of the Board in higher education, as they ultimately removed the sole remaining exclusion of nonprofit employers by legislating health care institutions under Board jurisdiction. P.L. 93-360, 88 Stat. 395, 93rd Cong., 2d Sess. (1974).

The Report of the House Committee on Education and Labor, which recommended that amendment to include nonprofit hospitals within the definition of "employer" under the Act, reviewed the history of the Board's initial exemption of certain eleemosynary, charitable and educational institutions from coverage under the Act, including specifically the exemption of colleges and universities in 1951 pur-

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[24] See p. 11.

suant to *Trustees of Columbia University, supra.* The Report then concluded:

> "Experience indicated that the withholding of Labor Board jurisdiction did not cut down on the number of strikes nor labor unrest. Accordingly, in recent years, the Labor Board began to assert jurisdiction over areas that it had formerly left alone:
>
> 1. Private, profit hospitals. . . .
> 2. Private, profit nursing homes. . . .
> 3. Nonprofit, cooperative insurance companies. . . .
> 4. *Private colleges and universities.* . . .
>
> The only broad area of charitable, educational, eleemosynary institutions wherein the Labor Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded from the Labor Act by § 2(2)." H. Rep. No. 92-1252, 92nd Cong., 2d Sess., 4 (1972) (emphasis supplied)

When the legislation was debated in the Senate, Senator Harrison Williams, who chaired the Labor and Public Welfare Committee which recommended the amendments to the Senate, addresed his colleagues:

> "The current exemption from the act of nonprofit hospitals is not only inconsistent with the protection enjoyed by proprietary hospitals and other types of health care institutions, but it is also inconsistent with the coverage of other *nonprofit colleges and universities,* philanthropic lodging houses, nonprofit educational broadcast stations, and nonprofit, cooperative insurance companies." 120 Cong. Rec. 12938 (1974) (emphasis supplied).

In the House, supporters of the legislation similarly noted the Board's exercise of jurisdiction and involvement in the area of higher education since its decision in *Cornell University, supra.* See, 118 Cong. Rec. H. 7249, 7251 (1972); 120 Cong. Rec. H. 4590 (1974). Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare in 1973 not only included testimony concerning the Board's exercise of jurisdiction in higher education, but also testimony regarding the Board's treatment of professional employees in fields other than health care, including colleges and universities. Testimony before the Subcommittee spelled out at length the concept of "professional direction" as distinct from supervisory authority in the specific context of faculty action in colleges and universities. Testimony before the Subcommittee cited and summarized the principles enunciated by the Board in *C.W. Post Center of Long Island University, supra; Fordham University, supra; Manhattan College,* 195 NLRB 65 (1972); and *Florida Southern College,* 196 NLRB No. 133 (1972). See Hearings on S.795 and S.2292, Subcomm. on Labor, S. Comm. on Labor and Pub. Welfare, 93rd Cong., 1st Sess., 316-19 (1973).

In its enactment of the 1974 amendments, Congress rejected specific proposals from professional organizations to amend section 2(11) so as to exclude specifically certain professionals from the definition of "supervisor." Both the House and Senate reports on the legislation emphasized, however, the distinction between supervision *in the interest of the employer* and supervision *in a professional capacity in furtherance of a professional mission.* Thus the Report of the Senate Labor and Public Welfare Committee noted:

> "The Committee has studied [§ 2(11) of the Act] with particular reference to health care profes-

> sionals, such as registered nurses, interns, residents, fellows, and salaried physicians, and concludes that the proposed amendment is unnecessary because of existing Board decisions. The committee notes that the Board has carefully avoided applying the definition of 'supervisor' to the health care professional *who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.*
>
> "The Committee expects the Board to continue evaluating the facts of each case in this matter when making its determinations." S.Rep. No. 93-766, 93 Cong., 2d Sess., 6 (1974) (emphasis supplied).[25]

Thus Congress enacted no amendment to section 2(11) in 1974, deeming such amendment "unnecessary because of existing Board decisions" relative to health care and other professional employees. Although the Board in the instant proceeding applied precisely those standards which it enunicated in its initial decisions concerning faculty in higher education,[26] the lower court rejected those standards as "unjustified [and] arbitrary" (Pet. App. 42a). Its decision rejects not only the soundness of those standards as relied upon by Congress, but as consistently applied by the Board[27]

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[25] The Board has thus carefully limited its definition of health care professionals as supervisors, separating their "primary and indeed overriding responsibility . . . to maintain the best possible patient care" from alleged supervisory action in the interest of the employer. *Mercy Hospitals of Sacramento,* 217 NLRB 765, 767 (1974). See also *St. Mary's Hospital,* 220 NLRB 496 (1975); *Trustees of Noble Hospital,* 218 NLRB 1441 (1975).

[26] See p. 11 and n.5, *supra.*

[27] See n.5, *supra.*

and as recently upheld by the First Circuit Court of Appeals in *Trustees of Boston University, supra.*

In *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1973), this Court summarized the principle of statutory construction relevant here:

> "[A] court may afford great weight to the long-standing interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. *In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.*" *Id.* at 274-75. (emphasis supplied; citation omitted).

In *NLRB* v. *Catholic Bishop of Chicago*, — U.S. —, 47 U.S.L.W. 4283, 4287 (3/21/79), the Court again applied this principle of statutory construction, concluding that the 1974 amendments cannot be read "as reflecting Congress' tacit approval of the Board's action" in affording coverage to employees of church-operated schools, since the Board did not assert such jurisdiction until after the 1974 amendments. In the circumstances here at issue, the Board had extended its jurisdiction to private institutions of higher education *and* their faculties well before the enactment of the 1974 amendments, and Congress' recognition of that action was neither tacit nor implicit. The legislative history clearly reflects explicit congressional recognition and approval of the Board's exercise of jurisdiction in private higher education.

The decision of the lower court stands alone and unsupported in its finding that the Board's jurisdiction and standards, as applied in virtually all cases involving faculty in higher education, are in conflict with the Act.

III.

The decision of the Board in the underlying representation proceeding was supported by substantial evidence; and the court below failed to review the record in that light, but instead improperly imposed its own findings and conclusions over those of the Board.

The lower court failed to apply the standard of substantiality of the evidence in its review of the factual findings of the Board and reached its conclusion despite the substantial evidence on the record in support of the findings of the Board. The Court did not defer to the expertise and fact-finding role of the Board, but imposed its judgment over that of the Board in the finding of facts on which it based its determinations of law. The court erred specifically as to the interpretation and application of certain material evidence.

In *NLRB* v. *Pacific Grinding Wheel Co., Inc.*, 572 F.2d 1343, 1347 (9th Cir. 1978), the court "commence[d] by reciting the usual litany" relevant to its scope of review of a Board determination on unfair labor practice charges, like those here at issue, under section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5):

> "Our power to review the factual findings of the NLRB is limited, for such findings are conclusive if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Thus, if there is evidence to support each of two conflicting views, the findings of the Board must be allowed to stand despite the fact that we might have reached the opposite conclusion on our own. *NLRB* v. *Walton Manufacturing Co.*, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed. 2d 829 (1962); *Universal Camera Corp.* v. *NLRB, supra.*"

Precisely on point with the scope of the lower court's review of the Board's determination here at issue, the First Circuit Court of Appeals in *Boston University, supra*, 575 F.2d 301, 305, discussed the standards of judicial review of a Board determination as to supervisory or managerial status:[28]

> "The question of who are supervisors or managerial employees is one of fact for the Board, *Stop & Shop Companies, Inc.* v. *NLRB*, 548 F.2d 17, 18 (1st Cir. 1977), aff'd 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed. 2d 737 (1971), and the expertise of the Board in dealing with the gradations of authority between 'supervisors' and 'employees' can be so subtle that determining who is a supervisor must 'as a practical matter' involve 'a large measure of informed discretion.' *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)."

The lower court here concluded that the Board rendered its decision "without any analysis" and merely relied on doctrines promulgated in earlier Board decisions (Pet. App. 24a). But the Board, and its hearing officer, had before them evidence accumulated over twenty-one days of hearings, including over 4,600 pages of testimony and 200 exhibits.

There is no intention here to argue that the Board's determination on the record is incontrovertible, but rather that the Board rendered its decision on substantial evidence; and that the court failed to look to the substantiality of the evidence, but instead superimposed its judgment

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[28] "Keeping in mind the substantial evidence test," the court said, its review of the record upheld the Board determination that faculty department chairpersons do not exercise supervisory authority over other faculty (and their exercise of supervisory authority over non-unit personnel was insufficient to render them supervisors). *Id.*

on the weight and balance of the evidence over that of the Board. In this respect, the lower court erred.

Certain of the court's characterizations of the facts are relevant to review here in light of the deference owed to the Board in dealing with these "gradations of authority between 'supervisors' and 'employees.' " The following text lists only some examples of the court's findings of fact, viewed against a deeper analysis of the record:

> (i) "Dean Mirsky [of Stern College] has never made a faculty appointment which was not approved by a department chairman." (Pet. App. 9a).
>
> The record shows, however, that the Dean takes the responsibility for the interviewing of all candidates after he has received authorization from higher administration officers for the filling of the vacancy (A. 210, 211-12). He has then overruled the faculty in decisions affecting nonrenewal (A. 241).
>
> (ii). "The University President has granted the great majority of recommended promotions and has never overruled a negative recommendation [from the faculty at Stern College]." (Pet. App. 9a).
>
> The Dean at Stern College testified, however, that recommendations on promotions from the faculty will be "generally approved," but both negative and positive recommendations are referred to the Academic Vice President and President for independent review (A. 59, 218-19, 267-68). The President has nonetheless exercised his prerogative to freeze all faculty promotions, notwithstanding then pending recommendations (A. 1278, 1459).
>
> (iii) "[At Yeshiva College] senior professors screen applicants for faculty positions. [The dean]

and the senior professor then jointly make the hiring decisions with [the dean] *generally* accepting the recommendations of the senior professor." (Pet. App. 10a). (Emphasis added).

The record reflects, however, that the dean refers senior professors' recommendations to the President only after his independent review of the applicant's qualifications (A. 273). The dean noted that not all senior professors take this role seriously and some perform only perfunctorily, leaving the major burden to him (A. 274-75).

(iv) "[At the Belfer School], the hiring of faculty members and the length of their appointments are determined by a majority vote of the department. Dean Komar testified that his only role in hiring is his participation in the discussion and voting on applicants to his department. Decisions on promotion, tenure and non-renewal of faculty appointments are also made within each department by consensus. Komar stated that he does not believe he has the right to overrule such departmental decisions." (Pet. App. 14a).

The Dean testified, however, that he has not referred all department recommendations in these areas to the President (A. 473-74), as the Faculty Constitution at the School allows the dean the *authority* to disapprove such recommendations (*id.*). In any event, the President has not granted all promotion recommendations from the School's departments (A. 742).

(v) "The Promotions Committee effectively determines questions of faculty promotions [at the Ferkauf School]." (Pet. App. 15a).

The dean, however, sits on this Committee and has refused to act on recommendations from the Committee, thereby precluding promotions which require referral by the dean and action by the President (A. 668).

(vi) "The [Faculty Review] Committee has jurisdiction to review faculty grievances, particularly those concerning promotion and tenure . . . and is authorized to recommend action to the President." (Pet. App. 17a).

The record, however, refers to the facts of a single case before this Committee, where it concluded it had *no authority* to bring about the rehiring of a non-renewed faculty member. Its sole recourse, the Committee reported, was to refer the matter to the President "in whom ultimate responsibility rests. . . . He alone makes the crucial decision." (A. 133).

(vii) "The purpose of the [Academic Priorities and Resource Allocation] Committee is to provide a long-range scale of academic and fiscal priorities at Yeshiva . . . [and it] is empowered to reevaluate the objectives of the schools of the University. . . . It should be noted, however,that this committee at the time of the hearings had met only twice and had not focused upon particular problems nor made any specific recommendations." (Pet. App. 17a-18a).

This Committee was formed during the organization of the union and is composed of every dean and director and virtually every University officer and administrator except the President, as well as faculty representatives *elected* by their colleagues (A. 1175, 1171). The University's witness testifies that to date

the faculty do not know that this Committee is about (A. 332), and it has taken no substantive action and has not even determined its purposes (A. 332, 333).

The foregoing analysis is not intended to be exhaustive. At best, it is exemplary of the shading, nuances and different lights which the evidence may shed on the issue of the faculty's status. But the court not only erred in its review of the facts and in its virtually *de novo* analysis and findings, it also omitted reference to and reliance upon other crucial facts in this record. References to only a few examples may suffice in further support of the substantiality of the evidence on which the Board acted, and the failure of the court to apply that standard to its review:

(i) The President has denied a faculty resolution on retirement age (A. 712-13).

(ii) The President has rejected an amended bylaw for the Yeshiva College faculty, as proposed and passed by the Yeshiva College faculty (A. 694-95).

(iii) Deans will deny recommendations on department expense budgets from senior faculty or department chairmen (Tr. 2430).

(iv) The Registrar and other administrative officers have denied faculty recommendations regarding academic standards and transfer credits (A. 362).

(v) At the Belfer Graduate School, the dean has denied approval to the appointment of an *elected* department chairman (A. 410-11).

(vi) The dean at the Belfer School denied a request of the Library Committee to meet with administration officers over the contemplated move of the Belfer Library (A. 472, 1455).

(vii) The Belfer Faculty Committee formally protested "the failure to consult with the faculty on matters of concern to it," with specific reference to the dean's refusal to convene the Academic Credentials Committee and Faculty Committee to pass on qualifications of new appointees to the faculty (A. 724, 1469).

(viii) The Belfer faculty's election of a faculty representative to the University committee to plan the formation of faculty senate was unilaterally vetoed by the dean (A. 726).

(ix) The dean at the Ferkauf School has denied a tenure recommendation approved by the entire body of tenured faculty at the School (A. 632).

(x) The dean at the Ferkauf School has also vetoed faculty sabbatical requests (A. 671-72).

(xi) The dean at the Werzweiler School has denied a faculty committee recommendation for a new appointee and made an offer to a candidate of his own choosing (A. 525-28).

(xii) The dean at the Werzweiler School has denied faculty recommendations for the formulation and structure of a Committee on Academic Appointments, seeing the proposal as too "tight on the dean's collar." (A. 534-36).

Undoubtedly the University can point to corresponding incidents where faculty recommendations, requests and demands have been met by the administration, as well as virtual practices whereby faculty opinion has gained general acceptance. But the picture here is not one where there is not communication between faculty and administration,

nor where faculty judgment is disowned as either valueless or conflicting with the best interests of the University. Instead, the University maintains its discretion—in terms of unilateral and ultimate authority—to give what weight and import to collective faculty input as it may choose and deem consistent with its prerogatives and goals.

That analysis was properly made by the Board on the basis of the extensive record before it. Surely this Court cannot and should not undertake an analysis of the evidence, *except* to the extent that the underlying record here amply and aptly supports the determination of the Board. The propensity of the lower court to go further into the mass of the record was not only beyond its appropriate scope of review, but also caused it to err in its analysis. It not only overlooked evidence in apposition to its conclusions of fact, but it miscontsrued other evidence.

In a separate section of its fact-finding, the court analyzes and apparently relies upon the authority of the faculty at the Teacher's Institute for Women ("TIW") (Pet. App. 12a), where the University initially contended that four full-time and ten part-time faculty are employed. The court cites in this section the faculty's rejection of a proposal to move the School, and later in its conclusions of law refers to the same again (*id.* at 23a). The court also cites the Director of TIW as remarking: "The faculty is the School." (*id.* at 34a).

The court failed, however, to note that the Board made specific findings with respect to the faculty at TIW:

> "The record indicates that there are currently no faculty members at [TIW] holding full-time appointments with the University; rather the faculty listed by [TIW] as teaching a full 12-hour load are,

> in fact, part-time faculty without University appointment. Accordingly, such faculty are not eligible to vote in the election." Pet. App. 69a, n. 9.[29]

The court quite clearly weighed and relied on evidence of the role of the faculty at TIW, although the Union did not seek to represent these faculty and the Board found them to be excluded from the bargaining unit. The court surely did not find the Board's determination in this respect in error, since the question of the status of these faculty arose over the credibility of a University witness.[30] Since the court did not even address the issue of the inclusion of these faculty in the bargaining unit (and thereby overrule the Board's determination in this respect), the inference must follow that it overlooked the Board's footnoted exclusion of these faculty and the testimony of their director.

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[29] The Board noted also: "At the close of the hearing, the Petitioner indicated that it did not seek to represent faculty at [TIW]" insofar as they do not hold full-time faculty appointments, but are part-time faculty. Pet. App. 66a, n.3.

[30] The sole witness on the question of the status of faculty at TIW was its director. In response to a question as to the nature of his job, he referred to his notes and responded: "I consider myself as the executive arm of the faculty." (A. 388). The phrase happened to be identical to the self-description of the dean of James Striar School (A. 361) and the dean of Erna Michael College (A. 320), who had testified on the immediate hearing dates prior. The Hearing Officer granted a *voir dire* with respect to the notes held by the witness, who initially refused to turn them over (Tr. 3047-48). In the *voir dire*, he testified that his self-descriptive phrase merely came from his "flare for English" (Tr. 3050) and then ripped up the notes. The notes, pieced together, contained only the following markings: "faculty makes decisions and I cary them out"—"job security, subject job security, tenure" (Tr. 3049). The director of the TIW "did not know" whether his faculty participated in the retirement plan for full-time faculty of the University, and after University counsel offered to submit proof on that issue, he failed to do so (A. 389-90). University counsel acknowledged, however, that the faculty at TIW "may lack full-time faculty appointments in its formal sense" (Tr. 2990-93).

Speculation as to the relevance of the court's reliance on these facts is futile. But the court's failure to defer to the Board's fact-finding and expertise in defining and interpreting gradation of authority has caused its decision to go far beyond a determination as to whether there was substantial evidence on which the Board rendered its determination. The court instead judged the evidence anew and rendered an independent decision on its judgment of that evidence. The court erred both in the scope of its review and in the findings and conclusions it drew therefrom.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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